

**REMARKS**

Claims 1, 4-10, 18 and 19 were finally rejected in the Office Action of October 16, 2001. A Notice of Appeal was filed on April 16, 2002 and an Appeal to the Board of Appeals ensued. The Decision on Appeal was mailed July 11, 2003.

Claims 1, 4-10, 18 and 19 remain pending. Their reconsideration is requested, in light of the enclosed Declaration of Paul A. Tilman, the enclosed Declaration of Joseph P. Krause, and the enclosed test report of Gaynes Labs, Incorporated, all of which are submissions under 37 C.F.R. 1.114(c).

Paul A Tilman is the inventor of the '689 patent. Mr. Tilman unequivocally states in the enclosed Declaration of Paul A. Tilman that the '689 patent does not explicitly or inherently teach an airtight seal.

That the Tilman '689 seals are not airtight is borne out by tests that were performed on product bags having Tilman '689-style seals. The Declaration of Joseph P. Krause states that the Tilman-'689 seals were tested by an independent testing laboratory and determined to leak. The report of Gaynes Labs attached to the Krause declaration shows that every one of the Tilman '689 seals leaked.

The accompanying Request for Continued Examination (RCE) is timely under the provisions of 37 C.F.R. § 1.114, which provides that an RCE can be made prior to the filing of a notice of appeal to the U.S. Court of Appeals for the Federal Circuit. Under 37 C.F.R. §1.304, the time for filing a notice of appeal is two months from the date of the Board's decision.

The Board's Decision on Appeal bears only a mailing date of July 11, 2003. The date by which an RCE can be filed should therefore be September 11, 2003.

In addition to the enclosed submissions, new claims 22 – 26 are directed to a method of manufacturing an airtight reclosable seal. Paraphrased, these claims recite that the segment seal is fused to the sealing profiles while simultaneously cutting the segment seal, to form individual reclosable segments.

The Applicants submit that the new claims are allowable because none of the references cited by the Examiner show or suggest simultaneously fusing and cutting reclosable seal segments. Support for the new claims is found in the specification on pages 2, 3, 7, and 8. No new matter has been added.

In addition to consideration of the new claims, the Applicants request reconsideration of pending claims 1, 4-10, 18 and 19 in light of the Declaration of Paul A. Tilman. Mr. Tilman is the sole inventor of U.S. Pat. No. 5,071,689, hereafter the '689 patent, which is the reference upon which the pending claims were rejected – ostensibly because the '689 patent inherently taught an airtight seal.

As the Examiner knows, claims 1, 4-10, 18 and 19 were rejected by the Board because the Examiner alleged, and the Board agreed, that the '689 patent inherently disclosed an airtight seal. The Board stated on page 7 of the Decision that: "the Tilman '689 disclosure [was] sufficient to reasonably support the examiner's determination that the spot seal 21 of Tilman '689 [possessed] the...limitations recited in the last paragraph of claim 1 so as to establish a *prima facie* case of anticipation and thereby shift the burden to appellants to prove that the seal of Tilman '689 does not possess such features." (Emphasis added.)

In response to the Board's admonition to prove that the seal of Tilman '689 is not airtight, the applicants have enclosed the Declaration of Paul A. Tilman, who as the sole inventor of the '689 patent states that the '689 patent does not teach an airtight seal under any definition of

airtight. Mr. Tilman's declaration proves that the '689 patent does not show or suggest an airtight seal.

In particular, paragraph 11 of the Tilman declaration states that FIG. 4 of the '689 patent shows a small space between the spot seal 21 and the terminal extent of the female base 14 where there is no seal structure. This small space is clearly identified in the Tilman declaration.

As stated in paragraph 10 of the Tilman declaration, the female base 14 and the arrow-shaped protuberance 15 that form a reclosable seal do not extend all the way to the spot seal because of the heat and mechanical deformation used to form the spot seal. The air-passage space is encircled and identified in the Tilman Declaration as an "AIR GAP REGION."

As the sole inventor of the inventor of the '689 patent, Mr. Tilman is the person most knowledgeable about the seal structure and methodology disclosed in the '689 patent. (Decl. of Paul A. Tilman ¶8.) According to Mr. Tilman, the spot sealing disclosed in the '689 patent cannot produce an airtight seal because the air gap between the spot seal and the sealing profiles that will let air freely pass. (Decl. of Paul A. Tilman , ¶13) According to Mr. Tilman, the seal structure and methodology disclosed in the '689 patent will not produce an airtight seal, regardless of how the word "airtight" is defined. (Decl. of Paul A. Tilman , ¶14.)

Unless the Examiner has information regarding the '689 patent that Mr. Tilman is not aware of, Mr. Tilman's declaration clearly and irrefutably establishes that the Examiner's reliance upon the '689 patent was improper. In light of the Declaration of Paul A. Tilman, allowance of pending claims 1, 4-10, 18 and 19 is respectfully requested.

The Examiner's attention is directed to page 5 of the Decision on Appeal, whereat the Board said: "Tilman '689 also states that the integral hinges 'comprised flattened heat seals' (col. 4, line 51) and that the zipper sections have hinge pieces and end seals 'merging toward said

hinge pieces' (col. 4, lines 67-68)." The Board said that a representative Tilman '689 seal was shown in Figures 3 and 4.

Column 4, line 51 of the '689 patent is part of the '689 patent's claims.

~~zipper sections arranged in end-to-end relation.~~  
50     **3. A zipper structure according to claim 2, wherein  
said integral hinges comprise flattened heat seals be-  
tween the ends of the zipper sections.**

Excerpt of col. 4, showing contents of line 51.

Column 4, lines 67-68 of the '689 patent is also part of the claims.

65     **pieces are secured to said base areas.**  
       **8. A zipper structure according to claim 6, wherein  
the ends of the zipper sections have end seals merging  
toward said hinge pieces.**

Neither of these two claims teach an airtight seal.

As for the Board's citation to Figures 3 and 4 of the '689 patent as showing a Tilman '689 seal, in his Declaration, Mr. Tilman cites these two figures as showing an opening that precludes an airtight seal. (Decl. of Paul A. Tilman ¶¶ 9-12.) Unless the Board is aware of features shown in Figures 3 and 4 of which Mr. Tilman is unaware, the Board's reliance upon Figures 3 and 4 is baseless.

The Examiner's attention is also directed to the Declaration of Joseph P. Krause and to the test report of Gaynes Labs, Incorporated attached to the Krause declaration. As stated in the Declaration of Joseph P. Krause, five (5) reclosable bags having spot seals were leak tested according to an industry standard and determined to leak. In contrast, five Com-Pac bags having

seals as claimed were leak tested using the same test and determined to be airtight. The ten bags tested by Gaynes Labs are enclosed herewith.

As stated in the Declaration of Joseph P. Krause, when subjected to an industry standard leak test, physical embodiments of the spot seals disclosed in the '689 patent leaked air. In contrast, physical embodiments of the claimed fasteners were airtight.

Finally, with regard to the Board's assertion in footnote 2 that support for the claimed airtight seal was missing from the application as filed, support for the claims is clearly found on page 2, line 16 whereat the interlocking ribs of the profile strips are described as providing an airtight seal. From there, the specification goes on to describe how the profile strips are made and attached to a plastic bag, including a description of how the ends of the strips are fused. If the ends of the strips are not fused, the seal they form will not be airtight.

As the Examiner knows, the claims of an application form a part of a specification. In addition to the aforementioned specification text, claim 2 as it was originally filed, claimed the seal formed by the strips was airtight. Claim 20 as it was originally filed claimed an airtight reclosable storage bag. Thus, the airtight limitation was part of the original specification as part of the claim language.

Support for the currently-pending claims is thus clearly provided by the specification as it was filed. Airtight sealing strips were clearly described in the specification. They are claimed *and* disclosed in claim 2. Attaching an airtight seal to the open end of a plastic bag would make

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such a bag airtight, as claimed *and* disclosed in claims 18 and 20. The currently-pending claims that claim an airtight seal are supported by the specification and for the reasons set forth above in condition for allowance.

Respectfully submitted,

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